Supreme Court, U.S.
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NO. 87-441

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MARY SCOTT BLAKE BIRDSALL, MAGRUDER DENT, JR., and ROBERT PLAYFORD BOYLE, Executors of the Estate of Evernghim Blake,

Appellants,

v.

THOMAS R. SHEPHERD, JR. and R.J. CONNORS, Executors of the Estate of Kathleen Ann Kelley Blake and Trustees of the Kathleen Ann Kelley Blake Living Trust, and Personally, KATHLEEN SHEPHERD MACMILLAN, CHRISTOPHER H. SHEPHERD, MICHAEL K. SHEPHERD, MARY SHEPHERD COLEMAN, and ANN SHEPHERD LUGAR,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

MOTION TO DISMISS

LUCIUS H. BRACEY, JR.
Counsel of Record

JAY T. SWETT

McGuire, Woods, Battle & Boothe
Post Office Box 1288
Charlottesville, Virginia 22902
(804) 977-2500

Appellate Printing • Heritage Bldg. • 10th & Main • Richmond, VA 23219 • (804) 643-7789

QUESTION PRESENTED

Is a substantial federal question present in the contention of appellants that the Supremacy Clause and the Due Process Clause compel apportionment of state estate taxes among beneficiaries of a taxable estate in a manner described in a federal statute when the federal statute addresses only federal estate taxes?

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Appellants,

v.

THOMAS R. SHEPHERD, JR. and R.J. CONNORS, Executors of the Estate of Kathleen Ann Kelley Blake and Trustees of the Kathleen Ann Kelley Blake Living Trust, and Personally, KATHLEEN SHEPHERD MACMILLAN, CHRISTOPHER H. SHEPHERD, MICHAEL K. SHEPHERD, MARY SHEPHERD COLEMAN, and ANN SHEPHERD LUGAR,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

MOTION TO DISMISS

Pursuant to Rule 16, the appellees move the Court to dismiss the appeal herein on the grounds that the appeal is not within the jurisdiction of this Court because the appeal presents no substantial federal question and because the appeal is taken from the Supreme Court of Virginia which did not decide the merits of the case.

OPINIONS BELOW

The letter opinion of the Circuit Court of Albemarle County, Virginia, reproduced in the Appendix of the Appellants' Jurisdictional Statement at page 2a, omits an important phrase. The first sentence on page 3a should read "I am further of the opinion that there is no constitutional infirmity in the apportionment of the Virginia tax on a pro rata basis between those who receive the assets that were included in Mr. Blake's taxable estate." The entire opinion is attached hereto at Appendix, page 1a.

JURISDICTION

Appellees disagree with certain facts in the appellants' statement of jurisdiction.

The appellants incorrectly state that the Supreme Court of Virginia affirmed the final Order of the Circuit Court of Albemarle County, Virginia.[1] In fact, the Supreme Court of Virginia did not affirm the decision of the lower court but refused the appellants' petition for appeal.[2]

STATEMENT OF THE CASE

The factual background as presented by appellants throughout appellants' Jurisdictional Statement calls for correction and augmentation.

This case involves a controversy between the executors of Evernghim Blake's estate, on the one hand, and certain beneficiaries of Evernghim Blake's taxable estate, on the other, over the amount that should be contributed by those beneficiaries toward state, not federal, estate taxes.

Kathleen Ann Kelley Blake ("Mrs. Blake") died on November 19, 1983. Evernghim Blake ("Mr. Blake"), husband of Mrs. Blake, died on June 20, 1984. Both died as residents of Virginia. Under Mrs. Blake's will, codicils and trust agreement, Mr. Blake or his estate were paid $2,000,000 outright and the net income from a trust ("the trust")

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[1] Appellants' Jurisdictional Statement, p. 5.

[2] Appellants' Jurisdictional Statement, Appendix, p. 1a.

established by Mrs. Blake.

A portion of the trust (Qualified Terminable Interest Property ["Q-TIP"]) was included in Mr. Blake's estate.[3] The same assets were included in Mrs. Blake's estate but qualified for the marital deduction.[4]

Mr. Blake's three children by his prior marriage and Mrs. Blake's six children by her prior marriage, the latter being the appellees, are all beneficiaries with respect to Mr. Blake's taxable estate. None of the assets comprising the Q-TIP trust were located in Maryland although Mr. Blake did own a farm in Maryland.

Both Virginia and Maryland have their own respective estate tax returns which differ from each other and which differ from the federal estate tax return although both state returns call for various figures from the federal estate tax return. Each state makes various adjustments to the figures from the federal return.

Contrary to appellants' statement[5], neither Virginia nor Maryland estate taxes are equal to a graduated percentage of the federal estate tax in any direct fashion. Both Maryland and Virginia estate taxes are related to the federal credit for state death taxes which is, in turn, related to the taxable estate, not taxes, with certain adjustments.

Maryland makes no claim for taxes on any trust assets because none of the trust assets were located in Maryland. Mr. Blake was not a resident of Maryland and Maryland estate tax applies only to property located in Maryland when the decedent is a non-resident.

Appellants suggest[6] that appellees have avoided paying a tax but have claimed a credit based upon the payment. Any credits would have been claimed on Mr. Blake's estate tax return. Appellees had nothing to do with Mr. Blake's estate tax return other than providing certain information to counsel for Mr. Blake's executors concerning values of trust assets. No evidence was offered to prove that Mrs. Blake's executors, or any of the appellees, have claimed any credit to

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[3] Pursuant to Internal Revenue Code §2044, the value of the portion of the trust included in Mr. Blake's estate on the regular estate valuation date was $11,310,502. The value of the portion of the trust included in Mr. Blake's estate on the alternate valuation date selected by Mr. Blake's executors, appellants, was $11,805,791, a higher value.

[4] Pursuant to Internal Revenue Code §2056(b)(7).

[5] Appellants' Jurisdictional Statement, p. 11.

[6] Appellants' Jurisdictional Statement, p. 25.

which they were not entitled.

Internal Revenue Code ("IRC") §2207A provides for the recovery of federal estate taxes[7] calculated on an incremental basis by the decedent's estate from the person or persons receiving Q-TIP property included in the decedent's estate. Virginia Code §64.1-161[8] apportions estate taxes generally on a pro rata basis instead of an incremental basis. Maryland has a statute similar to Virginia's.[9] Appellees, the persons ultimately recieving the Q-TIP property, have contributed an incremental amount of federal estate taxes as required by IRC §2207A. Appellees have contributed a pro rata amount of Virginia taxes as required by Virginia Code §64.1-161. Appellees made no contribution to Maryland estate taxes because none of the property received by appellees was subject to Maryland tax. Furthermore, Mr. Blake's will provision specifying the source of estate tax payments governed with regard to Maryland taxes and did not require payment by appellees.

Appellants state[10] that Mrs. Blake's executors reimbursed Mr. Blake's estate for a proportionate amount of Virginia estate taxes; the proportionate contribution in the amount of $1,337,395 was actually made by the trustees of Mrs. Blake's trust on behalf of the beneficiaries of the trust, the appellees.

The Circuit Court of the County of Albemarle, Virginia, by letter opinion dated 12 May 1986 incorporated in a final Order dated 12 June 1986 determined that appellees contributed all that was required by the Virginia statutes, and that appellees were not obligated to contribute toward Maryland taxes. The Circuit Court in reaching its decision construed the Virginia and Maryland statutes, and also found that appellants' constitutional claims were without merit. The Supreme Court of Virginia on the 16th day of June 1987 refused the appellants' petition for appeal.

Appellants contend that the Supremacy Clause requires

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[7] Internal Revenue code §2207A contains the phrase when it describes the recovery "tax under this chapter." The chapter referred to is the chapter of Internal Revenue Code assessing federal estate taxes.

[8] §64.1-161A after the 1986 amendment. Virginia Code §64.1-162 empowers the fiduciary of an estate to recover taxes apportioned under §64.1-161.

[9] Maryland Estates and Trusts Code, §11-109.

[10] Appellants' Jurisdictional Statement, p. 12.

apportionment of state estate taxes in a manner required by IRC §2207A with regard to federal estate taxes, and that pro rata apportionment as determined to be correct by the lower court results in a taking of property without due process of law in violation of the Fourteenth Amendment.

ARGUMENT

I. Appellants have not established any substantial basis for their constitutional claims and have not raised any substantial federal questions.

A. The Supremacy Clause does not compel apportionment of state estate taxes in a manner identical to federal estate taxes.

Without speculating about whether Congress could have addressed *state* taxes in IRC §2207A, it is clear from the wording of §2207A[11] that Congress did not address state taxes but

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[11] [Sec. 2207A]
SEC. 2207A. RIGHT OF RECOVERY IN THE CASE OF CERTIAN MARITAL DEDUCTION PROPERTY.

[Sec. 2207A(a)]
(a) RECOVERY WITH RESPECT TO ESTATE TAX.—

(1) IN GENERAL.—If any part of the gross estate consists of property the value of which is includible in the gross estate by reason of section 2044 (relating to certain property for which marital deduction was previously allowed), the decedent's estate shall be entitled to recover from the person receiving the property the amount by which—

(A) the total tax under this chapter which has been paid, exceeds

(B) the total tax under this chapter which would have been payable if the value of such property had not been included in the gross estate.

(2) DECEDENT MAY OTHERWISE DIRECT BY WILL.—Paragraph (1) shall not apply if the decedent otherwise directs by will.

[Sec. 2207A(b)]

(b) RECOVERY WITH RESPECT TO GIFT TAX.--If for any calendar year tax is paid under chapter 12 with respect to any person by reason of property treated as transferred by such person under section 2519, such person shall be entitled to recover from the person receiving the property the amount by which—

(1) the total tax for such year under chapter 12, exceeds

(2) the total tax which would have been payable under such chapter for such year if the value of such property had not been taken into account for purposes of chapter 12.

(continued)

addressed only federal taxes. Neither the wording of IRC §2207A nor its legislative history contain any indication of Congressional intent to preempt state apportionment provisions with respect to Q-TIP related *state* taxes.[12] Section 2207A refers to taxes imposed by the Internal Revenue Code, expressly Chapter Eleven of the Internal Revenue Code, that is, to federal taxes. No actual conflict exists between compliance with IRC §2207A for federal taxes, as was done in this case, and the proportional concept of Virginia's Section 64.1-161 as it applies to Virginia taxes. Section 64.1-161 of the Code of Virginia as applied in this case does not stand as an obstacle to the accomplishment and execution of the purpose and objective of Congress in enacting §2207A to govern the allocation of Q-TIP related *federal* estate taxes.

Contrary to what appellants suggest by citing cases in non-estate tax contexts, this Court, in *Riggs v. Del Drago,* held that even the apportionment of *federal* estate tax amongst those beneficially interested in the taxable estate, in the absence of a federal law to the contrary, is determined by state law. 317 U.S. 95, 110 (1942). Similarly, in *Mazza v. Mazza,* a U.S. District Court found that state law determined the impact of federal estate tax on those receiving property. 475 F.2d 385, 387 (D.C. Cir 1973). Except in instances where Congress has expressly provided for the apportionment of the federal estate tax, state law, rather than federal law, is determinative of the apportionment of federal taxes. *Id.*

Hisquierdo v. Hisquierdo, cited by appellants, deals with U.S.

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[Sec. 2207A(c)]

(c) MORE THAN ONE RECIPIENT OF PROPERTY.—For purposes of this section, if there is more than on person receiving the property, the right of recovery shall be against each such person.

[Sec. 2207A(d)]

(d) TAXES AND INTEREST.—In the case of penalties and interest attributable to additional taxes described in subsections (a) and (b), rules similar to subsections (a), (b), and (c) shall apply.

[12] Virginia's apportionment statute was in existence when IRC §2207A was enacted. Numerous other states have statutes similar to Virginia's requiring apportionment of state estate taxes on a proportional basis. Appellant's Jurisdictional Statement, p. 23.

Railroad Retirement Act benefits and the question of whether claims may be asserted to those benefits under the guise of community property schemes which would divert benefits from the retired employees when the federal statute provided that such benefits were not to be diverted by "legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated..." 439 U.S. 572, 805 (1979). There is no analogy to the circumstances at hand. IRC §2207A contains no similar provision which even by implication might preempt state apportionment schemes. Interestingly, *United States v. Yazell,* 382 U.S. 341 (1966), cited by appellants, held that federal interests in the context of the Small Business Administration loan collection procedures did not require preemption of state rules. *Free v. Bland,* 369 U.S. 663(1962), relied upon by appellants, dealt with the Treasury Regulations under which U.S. savings bonds were issued explicitly providing that such bonds, when registered in a certain fashion, pass by right of survivorship. Federal law was clear and therefore the survivorship feature was upheld against an interest claimed under Texas community property laws. Federal law in the context now before the Court is also clear. The federal law applies to federal taxes, and appellees have contributed federal taxes consistent with federal law. The federal law does not apply to state taxes. States are not even required by Congress to have marital deduction laws much less required by Congress to apportion related taxes in a certain fashion.

Appellants also cite *Shepheard v. Godwin,* but without offering any explanation concerning the application of this case to the facts at hand. 280 F.Supp. 869 (E.D.Va. 1968).

Appellant's assertion that the Supremacy Clause requires Virginia and Maryland estate taxes to conform to the federal scheme in IRC §2207A contradicts the long-standing position of this Court that a state's power to tax is separate and distinct from the federal government's power to tax, and the federal government's power to tax in no way curtails a state's power to tax. In *Ward v. Maryland,* this Court held that the power to tax for state purposes is as much an exclusive power in the states as the power to lay and collect taxes to pay the debts and provide for the common defense and general welfare of the United States is an exclusive power in Congress. 79 U.S. (12 Wall.) 418, 420 (1871).

Although the taxation powers possessed by the states and the federal governments are subject to certain prohibitions and restrictions, in all other respects they are supreme powers possessed by each government entirely independent of the other. *Id.*

In a case dealing with the compatibility of federal and state statutory estate tax schemes, this Court held that even though both statutory schemes are laid on the same subject, neither has priority over the other. *Frick v. Pennsylvania,* 268 U.S. 473, 499 (1925). The Court went on the say that, subject to certain exceptions, the power of taxation granted the federal government does not curtail or interfere with the taxing power of the several states. *Id.* This power in the two governments is generally so far concurrent as to render it admissible for both, each under its own laws and for its own purposes, to tax the same subject at the same time. *Id.*

Thus, it has been settled that the power of taxation exists in the states to the full extent to which it may be exercised by any sovereign nation. A state's power of taxation is, where the subjects to which it applies are within the jurisdiction of the state, unlimited, plenary, absolute, and supreme. *See generally* 71 Am. Jur. 2d *State and Local Taxation* §§82, 83 & 103 (1973).

Although Virginia and Maryland may make reference to the federal estate tax return for certain numbers and to the federal estate tax laws for certain definitions, there are many instances where so-called "conforming" legislation has either not been enacted or been delayed. Both the special use valuation contained in IRC §2032A and the generation skipping tax contained in IRC Chapter 13 were enacted at the federal level in 1976. Virginia did not enact special use legislation until 1981[13] and did not enact a generation skipping tax until 1979.[14] Thus, the states are free to pick and choose in terms of conformity and the timing of conformity and that is what Virginia has done with regard to §64.1-161. The frequency with which federal laws have changed in the past few years make it impossible for state legislatures to conform, even if they should desire to do so, in lock step. In the

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[13] Virginia Code §58.1-931 et seq, Code of Virginia 1950, as amended.

[14] Virginia Code §58.1-935 et seq, Code of Virginia 1950, as amended.

past eleven years there have been five major changes in the federal estate tax laws: the Tax Reform Act of 1976, the Economic Recovery Tax Act of 1981, the Tax Equity and Fiscal Responsibility Act of 1982, the Tax Reform Act of 1984 (as a part of the Deficit Reduction Act of 1984), and the 1986 Tax Reform Act. Each of the foregoing federal tax acts made significant changes in federal estate taxation. It is impossible for the states to consider and make adjustments in their respective systems in order to conform immediately to federal tax legislation. Congress has not attempted to impose conformity, and the Supremacy Clause has no bearing in this case.

B. A pro rata apportionment of state estate taxes is not an unconstitutional taking of property without due process of law.

Appellants also argue that the proportional application of Virginia Code §64.1-161 creates an unconstitutional taking of property without due process of law. Appellants do not cite any estate tax apportionment cases. *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937), cited by appellants, deals with sweet gas production and sales quotas promulgated in Texas. Appellants offer no explanation concerning the applicability of that case to the facts at hand.

In fact, the U.S. Congress in IRC §2206 enacted a pro rata apportionment statute which is still in existence today. IRC §2206 deals with the liability of life insurance beneficiaries for estate tax and states "the executors shall be entitled to recover from such beneficiaries such portion of the total tax paid as the proceeds of such policies bear to the taxable estate...." Thus, even at the federal level, there is a pro rata apportionment scheme similar to the Virginia statute for certain assets. Appellants suggest[15] that the only way to avoid constitutional infirmity is for the appellees to pay 100% of the tax related to the Q-TIP property and for Mr. Blake's children to pay 100% of the tax related to the non-Q-TIP property. The problem with this position is that it does not take into consideration the progressive rates.[16] Virginia's

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[15] Appellants' Jurisdictional Statement, p. 14.

[16] The impossibility of this "two estate" analysis suggested by appellants (See Jurisdictional Statement, p. 24) can be proved through the following example. T
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apportionment statute simply apportions the progressive rates pro rata, and that does not result in a taking of another's property. No case has been cited which even remotely suggests that it does result in a taking of property that violates due process.

Maryland taxes are imposed only with regard to Maryland property and none of the trust property passing to appellees is Maryland property. Not only does the tax source clause in Mr. Blake's will govern the payment of Maryland taxes, Maryland apportionment statutes do not allocate taxes to appellees. Any recipient of an asset subject to taxes in a non-domiciliary jurisdiction might pay higher taxes by virtue of assets located in the state of domicile because the total taxes may be higher. Appellees who are the remaindermen of the trust have been forced to pay higher Virginia taxes by virtue of Mr. Blake's non-Q-TIP assets just as appellants have been forced to pay higher Virginia taxes by virtue of the Q-TIP assets. Apportionment by its very nature works in this fashion and has a long history of application in many contexts. It is simply a matter of sharing in the progressive rates which is the theory underlying all apportionment statutes. The sharing of progressive rates in a proportionate fashion does not result in the taking of property without due process, and no federal question has been raised by appellants in this regard.

II. An appeal does not lie from the refusal of a petition for appeal by the Supreme Court of Virginia.

Appellants, by their Notice of Appeal, seek to invoke appeal to this Court from the Supreme Court of Virginia. That court did not decide the merits but merely refused appellants' petition for

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has an estate, including trust interests, for tax purposes of $3,000,000; $2,000,000 goes to his sisters and $1,000,000 to his brothers. The total Virginia estate taxes on the $3,000,000, assuming all property to be in Virginia, is $182,000. However, if the taxes are calculated separately as if there were two estates involved, as appellants suggest, the tax on the $2,000,000 flowing to T's sisters is $99,600 and the taxes calculated separately on the $1,000,000 flowing to T's brothers is $33,200. The combination of the separate taxes is $132,800. However, the total taxes under Virginia law are $182,000. The difference of $49,200 ($182,000 minus $132,800) is a failure to consider the impact of the progressive rates, and discloses the conceptual error in the two estate notion advanced by appellants.

appeal. Therefore, technically, there is no jurisdiction under 28 U.S.C. 1257. *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157, 160 (1954); *American Railway Express Co. v. Levee,* 263 U.S. 19, 20-21 (1923).

CONCLUSION

Wherefore, appellees respectfully submit that the appeal should be dismissed for failure to present a substantial federal question and because the appeal was brought from the wrong court.

Respectfully submitted,

Lucius H. Bracey, Jr.
Counsel of Record

Jay T. Swett

McGuire, Woods, Battle & Boothe
Court Square Building
Post Office Box 1288
Charlottesville, Virginia 22902
(804) 977-2500

APPENDIX

Birdsall, et al. v. Shepherd, et al.
Chancery 5368-C
Albemarle County Circuit Court
(Letter Opinion dated 12 May 1986)

The primary dispute involved in this proceeding is whether the increased Virginia state tax liability of the Evernghim Blake estate, attributable to the inclusion of "Q-TIP" trusts assets in his taxable estate is to be allocated incrementally or porportionately on a pro rata basis. I conclude that Virginia Code §64.1-161, as applied to estates of individuals dying prior to July 1, 1986, requires that the tax be apportioned on a pro rata basis. The General Assembly of Virginia during its 1986 session gave recognition of no other interpretation of said statute when it made provision for incremental allocation of Virginia's tax attributable to "Q-TIP" trust assets that are included in the taxable estate of a person dying on or after July 1, 1986. I am further of the opinion that there is no constitutional infirmity in the apportionment of the Virginia tax on a pro rata basis between those who receive the assets that were included in Mr. Blake's taxable estate.

As for the Maryland tax liability, Mr. Blake's will in its paragraph FOURTH directs the payment of that tax. The asset located in Maryland was solely owned by Mr. Blake at the time of his death.

In summary, the defendants are not liable to the Evernghim Blake estate for any more of the Virginia estate taxes assessed against Mr. Blake's estate than they have already paid. They have no liability as to the Maryland tax.

As for defendants' request that representatives of Mrs. Blake's beneficiaries be permitted to participate in any audit procedures concerning the value of "Q-TIP" related assets, such request more appropriately is to be addressed to those tax officials who may conduct an audit.

Finally, the presence of the Commonwealth of Virginia was not necessary to the adjudication of the issues presented in this action. Its motion to drop its Tax Commissioner William Forst as a party defendant is granted.

Mr. Perkins will draft an order relative to the rulings herein made and will submit it to counsel for endorsement.